CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~907~~ ~~450~~ 133.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION PACIFIC RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 20, 1896.

(16197.)

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1 United States circuit court of appeals, eighth circuit.

In error to the circuit court of the United States for the district of Kansas.

THE UNITED STATES OF AMERICA, PLAINTIFF IN error, *vs.* UNION PACIFIC RAILWAY CO., AND S. S. H. Clarke, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane, as receivers of Union Pacific Railway Co., defendants in error.	No. 652. December term, A. D. 1895.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 17th day of February, A. D. 1896, hereby certifies that upon the record on file in said court in the above-entitled case, wherein the United States of America is plaintiff in error and the Union Pacific Railway Company and the other defendants above-named are defendants in error, and which cause is now pending before this court upon a writ of error duly issued to the circuit court of the United States for the district of Kansas, the following facts are made to appear and do so appear, to wit:

That on January 31, 1894, there was filed by the United States of America in said circuit court of the United States for the district of Kansas against the Union Pacific Railway Company and others a petition, which (omitting the third cause of action therein stated) was in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas, first division.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane, as receivers of the Union Pacific Railway Company, defendants.	

2 *Petition.*

Come now the United States of America, by Richard Olney, Attorney-General of the United States, and W. C. Perry, United States attorney for the district of Kansas, and say that the above-named defendant, The Union Pacific Railway Company, is a corporation duly organized and existing under and by virtue of the laws of the United States; that S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane are the duly appointed and acting Receivers of the said Union Pacific Railway Company, and that the matter in dispute herein exceeds the sum or value of ten thousand dollars, exclusive of interest and costs, and for a first cause of action against said defendants, state:

That in the year one thousand eight hundred and thirty-one, and for a long time prior thereto, plaintiffs were the owners in fee simple of all the

lands lying north of the Kansas and west of the Missouri rivers, in the then Territory of Kansas. That by the terms of a treaty made by and between said plaintiffs and the Delaware Nation of Indians, proclaimed on the 24th day of March, 1831, the said plaintiffs conveyed and secured to the said Del'ware Nation of Indians, as a permanent home for said nation, the country in the fork of the Kansas and Missouri rivers, extending up the Kansas River to the Kansas line and up the Missouri River to Camp Leavenworth, and thence by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet. That afterwards, in the year 1854, by the terms of a treaty by and between said plaintiffs and the said Delaware Nation of Indians, the said Delaware Nation of Indians ceded to said plaintiffs all their right, title, and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in and to the outlet mentioned in the treaty hereinbefore set forth, excepting that portion of said country sold to the Wyandotte tribe of Indians by instruments sanctioned by an act of Congress approved July 25, 1848, and also excepting that part of said country lying east and south of a line beginning at a point on a line between the land of the Delawares and half-breed Kansas forty miles in a direct line west of the boundary between the Delawares and Wyandottes; thence north ten miles; thence in an easterly course to a point on the south bank of Big Island Creek, which shall also be on the bank of the Missouri River where the usual high-water line of said creek intersects the high-water line of said river.

That said plaintiff further avers that said treaty, among other things, provided as follows:

Article 11. "At any time hereafter, when the Delawares desire it and at their request and expense, the President may cause the country reserved for their permanent home to be surveyed in the same manner as the ceded country is surveyed, and may assign such portion to each person or family as shall be designated by the principal men of the tribe; provided, such assignment shall be uniform."

Article 12. "In the settlement of the country adjacent to the Delaware reservation, roads and highways will become necessary, and it is agreed that all roads and highways laid out by authority of law shall have a right of way through the reserved lands, on the same terms that the law provides for their location through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have a right of way, on payment of a just compensation therefor in money."

That afterwards, as provided for in said treaty, the said Delaware Nation of Indians represented to plaintiffs that it was their wish that a portion of the lands reserved for their home might be divided among them in the manner contemplated by the 11th article of said treaty, as hereinbefore set forth, and thereupon, by the terms of a treaty made and entered into between said plaintiffs and the said Delaware Nation of Indians, concluded May 30th, 1860, it was provided, among other things, as follows:

3 "The Delawares having represented to the Government that it is their wish that a portion of the lands reserved for their home may be divided among them in the manner contemplated by the 11th

article of the treaty aforesaid, it is hereby agreed by the parties hereto that the said reservation shall be surveyed as early as practicable after the ratification of these articles of agreement and convention, in the same manner as the public lands are surveyed, and to each member of the Delaware tribe there shall be assigned a tract of land containing eighty acres, to include in every case, as far as practicable, a reasonable portion of timber, to be selected according to the legal subdivisions of survey."

Said treaty further provides by the last clause of section 2 thereof that

"The improvements of Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building their homes for them on the lands retained."

It was further provided in article 3 of said treaty that as to the remaining lands, after the tracts in severalty and those tracts for special objects names in said treaty had been selected and set apart, that the Leavenworth, Pawnee and Western Railroad Company, a corporation then organized and existing under and by virtue of the laws of the Territory of Kansas, should have the prior right of purchase upon the payment into the United States Treasury of the sum therein provided, which payment it was provided by said treaty should be made within six months after the quantity of said land was ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, should appraise to be the value, and providing that such value should not be placed below the value of one dollar and twenty-five cents per acre, exclusive of the cost of survey. It was further provided in article 3 of said treaty that the United States would issue a patent in fee simple directly to said company upon the payment as provided in said treaty, and the said article three further provides:

"It is therefore agreed by the United States that the wishes of the Delawares shall be granted; that they will accept the trust reposed upon them, and that the money resulting from such disposition of the lands shall be disposed of and applied in the manner provided for by the 7th and 8th articles of the Delaware treaty of sixth May, one thousand eight hundred and fifty-four, after expending a sufficient sum to enable them to commence agricultural pursuits under favorable circumstances. It is also agreed that said railroad company shall have a perpetual right of way over any portion of the lands allotted to the Delawares in severalty on the payment of a just compensation therefor, in money to the respective parties whose lands are crossed by the line of railroad."

By the terms of said treaty these plaintiffs became and were and still are the trustees of said Delawares for all of the purposes therein provided. That the said Leavenworth, Pawnee and Western Railroad Company prior to the year 1867 accepted the terms of said treaty and agreed to purchase the unallotted lands of said Delawares and to pay for said lands and the improvements thereon under and in accordance with the provisions and terms set forth in said treaty, and all of the rights of said railroad company in and to said lands and its liability for said lands and said improvements, and all the rights and liability of its grantee, successors, and assignee, the said defendant, The Union Pacific Railway Company, were fixed by the terms of said treaties, and the said Leavenworth, Pawnee and Western Railroad Company, and its grantee, successor, and

assignee, the defendant, The Union Pacific Railway Company, took said lands subject to the conditions set forth in said treaties as to the payment therefor and as to the payment for said improvements thereon. That, as provided in article 3 of said treaty, plaintiffs herein, on the 20th day of October, 1860, appointed three commissioners to inspect and appraise the value of all the lands and improvements which the said Leavenworth, Pawnee and Western Railroad Company had by the terms of said treaty become entitled to purchase, and said commissioners so appointed under the provisions of said treaty appraised such improvements then
4 known at the sum or value of nine thousand five hundred and thirty-four dollars and twenty-five cents, which appraisement was returned on or about the 23rd day of February, 1861, and plaintiffs say that a schedule of said appraisement, showing the improvements with their location and the value thereof, is set forth in page numbered one (1) of Exhibit A, attached to this petition, which is hereby made a part hereof, and to which reference is hereby made, to be read here the same as if fully set forth herein. And plaintiffs say that at the time of said appraisement of said improvements, and at the time of the said purchase of said land by the Leavenworth, Pawnee and Western Railroad Company, there were then other improvements on said land not included in said appraisement, but which afterward, on or about the day of , 18 , were appraised as provided in the last clause of art. 2 of said treaty of May 30th, 1860, at the sum of eleven hundred eighty-one and 50/100 dollars. An itemized statement of said improvements which are not included in said first appraisement is set forth on pages marked C of Exhibit A which are hereby made a part hereof.

And plaintiffs further say that the said Leavenworth, Pawnee and Western Railroad Company was unable to carry out the terms of the purchase of said lands and said improvements as provided in the treaties hereinbefore set forth, to pay for the same in gold and silver coin as in said treaty provided, and that afterwards a further treaty was made and entered into by and between plaintiffs and the said Delaware Nation of Indians on or about July 2, 1861, and ratified August 6th, 1861, and which in terms referred to the provisions of said sale of lands and improvements in the treaties hereinbefore set forth, by which last-mentioned treaty it was provided that said Leavenworth, Pawnee and Western Railroad Company might execute its bonds with interest warrants or coupons attached according to the forms in said last-named treaty provided, the principal sum of said bonds to be in the aggregate $286,742.15, and to execute a mortgage upon one hundred thousand (100,000) acres of land contemplated in and by said treaty as set forth in a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29th, 1861, said mortgage to be conditioned for the payment of said bonds, both principal and interest, said bonds and said mortgage being executed by said railroad company in lieu of said gold and silver coin, for the reason as set forth in said treaty, that said railroad company was not able to pay said sum of money within the time as provided therein; but no provision was made in said last-mentioned treaty for any change in the time or manner of the payment for said improvements as herein set forth, and the said bonds and mortgage were made, executed, and delivered to secure the payment of the purchase price of said lands only

exclusive of the value of said improvements, and the amount provided for and included in said mortgage did not cover or include said improvements.

That afterward, through changes in the name of the said Leavenworth, Pawnee and Western Railroad Company, and through a consolidation by and with other railroad companies, the defendant, The Union Pacific Railway Company, succeeded to all the franchises, property rights, and interests of the said Leavenworth, Pawnee and Western Railroad Company and became and is subject to all the liabilities of said company under and by virtue of the said several treaties, and under and by virtue of the purchase of the said Delaware Indian lands and the improvements thereon as hereinbefore set forth. That thereafter, by the terms of a treaty entered into on the 4th day of July, 1866, which treaty was ratified on or about the 26th day of July, 1866, in article first thereof, it was provided

"That the United States shall secure and cause to be paid to the said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee and Western Railroad Company, according to the terms of a treaty ratified August 22nd, 1860, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof."

Plaintiffs further say that by the terms of said treaty they became and were sureties for the payment of the value of said improvements, and that by the provisions of the treaties hereinbefore set forth and referred to said plaintiffs were and are the trustees for said Delaware Indians to collect and dispose of said money as provided in said treaties.

5 And these plaintiffs further say that neither said Leavenworth, Pawnee and Western Railroad Company, nor any of its assignees or successors, nor the Union Pacific Railway Company, nor the receivers, the defendants herein, have paid for any of said improvements on said lands as hereinbefore set forth, and that the same remains due and wholly unpaid so far as said Leavenworth, Pawnee and Western Railroad Company, its successors and assigns, and the said Union Pacific Railroad Company, and the other defendants, the said receivers, are concerned.

And these plaintiffs further say that by an act of Congress duly passed and approved on July 13th, 1892, there was appropriated and paid to said Delaware Indians the sum of $10,715.75, which sum these plaintiffs paid to said Delaware Indians as surety under the provisions of said treaties as hereinbefore set forth, and in discharge of its trust created in and by said several treaties with said Delaware Indians as hereinbefore set forth.

And these plaintiffs further say that by the terms of said treaties and by the acceptance thereof by the said Leavenworth, Pawnee and Western Railroad Company and its grantee successor and assignee, the defendant, the Union Pacific Railway Company, the said defendant, the Union Pacific Railway Company, became and is liable to these plaintiffs as said sureties and trustee for money paid out and expended on behalf of said defendants for said improvements as hereinbefore set forth and described in the said sum of $10,715.75, which sum, together with interest thereon at seven per cent from the 30th day of May, 1860, is now due and is wholly unpaid.

II. Plaintiffs for a second cause of action against the defendants state that by the terms of a treaty by and between these plaintiffs and the

Delaware Nation of Indians in the year 1854 and subsequent treaties, as set out in plaintiffs' first cause of action herein, to which reference is made, and the allegations therein as to said treaties are hereby made a part hereof, the same as if fully set forth herein, the said Leavenworth, Pawnee and Western Railroad Company became and was entitled to a right of way across the reservation of said Delaware Indians in the then Territory of Kansas, and across the lands subsequently allotted in severalty to said Delawares, upon the payment of a just compensation therefor for said right of way.

And these plaintiffs further say that by the provisions of said treaties plaintiffs became, and still are, the trustee for said Delaware Indians to collect the purchase price for their lands sold under the provisions of said treaties, and to collect and pay out in accordance with the provisions of said treaties the amount due and owing for the right of way from said railroad company; and by the provisions of the treaty of 1866, by the first article thereof, as set out in plaintiffs' first cause of action, which allegation in said first cause of action as to said treaty is hereby made a part hereof, these plaintiffs became and are sureties of the Leavenworth, Pawnee and Western Railroad Company and their successor and assign, the defendant herein, the Union Pacific Railway Company, for the payment of the amount due and owing for said right of way.

Plaintiffs further say that the said Leavenworth, Pawnee and Western Railroad Company, in pursuance of the provisions of said treaty and under and by virtue of the authority thereof, and subject to the liabilities and conditions therein provided, did select and lay out a right of way and construct a railroad thereon over and across the reservation of said Delaware Indians and over and across certain pieces and parcels of lands allotted in severalty to said Indians, as hereinbefore set forth, and under and by virtue of the provisions of said treaty said Leavenworth, Pawnee and Western Railroad Company became and was liable to these plaintiffs as trustees of said Delaware Indians for the damages to said lands and to said Indians by reason of said right of way.

And these plaintiffs say that the lands allotted in severalty that were crossed by said right of way, with the items of damage thereto and the amount of land taken in each several parcel or tract of land so crossed by said right of way, with the names of the allottees of said land, is set out in pages numbered consecutively from two to forty of Exhibit A, attached hereto, which are hereby made a part hereof.

6 These plaintiffs say that the reasonable damages by reason of said right of way across said allotted lands, as hereinbefore stated, and a reasonable compensation therefor was and is the sum of $28,959.41; that the value of said lands so taken by said right of way by the said Leavenworth, Pawnee and Western Railroad Company with damages said Delaware Indians by reason thereof was duly appraised by a commission duly appointed by the plaintiff herein as provided in said treaties. A copy or schedule of said appraisement is hereto attached as a part of Exhibit A, being pages marked 2 to 40, consecutively, of said Exhibit A, which are hereby made a part hereof and to which reference is made to be read here. That afterwards, through changes in the names of the said Leavenworth, Pawnee and Western Railroad Company, and through a consolidation by and with other railroad companies, the defendant, The Union Pacific Railway Company, succeeded to all the franchises, property,

rights, and interests of the said Leavenworth, Pawnee and Western Railroad Company, and became and is subject to all the liabilities of said company under and by virtue of the said several treaties and under and by virtue of the purchase of the said Delaware Indian lands and the improvements thereon as hereinbefore set forth; that neither of the said defendants has ever paid the said Delaware Indians or to these plaintiffs the amount due for said right of way; that by reason of the terms of said treaties and by reason of the trust there imposed on and accepted by plaintiffs, and by reason of the acceptance of said terms by the said Leavenworth, Pawnee and Western Railroad Company and by its successor, grantee, and assignee, the defendant, The Union Pacific Railway Company, the said defendant became and is still liable to these plaintiffs for said right of way and the damages growing out thereof.

And these plaintiffs say that by the provisions of the act of Congress passed and approved July 13th, 1892, plaintiffs appropriated and paid out to said Indians the sum of $28,959.41 for said right of way for and on behalf of the defendant, The Union Pacific Railway Company, and in accordance with the provisions of article one of the treaty of July 4th, 1866, by and between the said Delaware Indians and these plaintiffs, whereby these plaintiffs became and were sureties for the payment of the amount due and owing from the defendant, The Union Pacific Railway Company, as compensation for said right of way and the damages growing out thereof, by all of which the said defendant, The Union Pacific Railway Company, became and is indebted to these plaintiffs in the said sum of $28,959.41, with interest at the rate of seven per cent from January 1st, 1863, which sum is now due from said defendant to these plaintiffs and is wholly unpaid.

* * * * * * *

Wherefore, plaintiff prays for judgment against said defendants in the sum of $39,675.16, with interest thereon from January 1st, 1860, and for costs of suit.

RICHARD OLNEY,
Attorney-General.

W. C. PERRY,
United States Attorney.

Thereafter, on the 27th day of November, 1894, the Union Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, filed demurrers to said petition, which demurrers were in the words and figures following, to wit:

7 *Demurrer.*

THE UNITED STATES OF AMERICA, PLAINTIFF
vs.
THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, DEFENDANTS.

1. Now comes the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. E. Doane, and F. R. Coudert, as receivers of the Union

Pacific Railway Company, and demur to the first cause of action set forth in plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action against said defendants and in favor of said plaintiff.

2. Said receivers of the Union Pacific Railway Company demur to the second cause of action set forth in plaintiff's petition, for the reason that the same does not state facts sufficient to constitute a cause of action against the said receivers and in favor of said plaintiff.

* * * * * * *

A. L. WILLIAMS,
N. H. LOOMIS, and
R. W. BLAIR,
Attorneys for Receivers of Union Pacific Railway Company, Defendants.

* * * * * * *

Demurrer.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE UNION PACIFIC RAILWAY COMPANY AND S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, defendants.

1. Now comes the Union Pacific Railway Company, one of the defendants above named and demurs to the first cause of action set forth in plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the said defendant and in favor of said plaintiff.

2. Said defendant, The Union Pacific Railway Company, demurs to the second cause of action set forth in plaintiff's petition herein, for the reason that the same does not state facts sufficient to constitute a cause of action against the said defendant and in favor of the said plaintiff.

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A. L. WILLIAMS,
N. H. LOOMIS, and
R. W. BLAIR,
Attorneys for Union Pacific Railway Company, Defendant.

* * * * * * *

8 The said demurrers to said petition were thereafter, on the 22nd day of February, 1895, sustained by the circuit court of the United States for the district of Kansas, and said court thereupon ordered that said petition be dismissed and that the defendants go hence without day.

And said circuit court of appeals for the eighth circuit further certifies that said court desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law arising upon the record in such cause, to the end that it may properly decide said cause.

Questions:

First. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $10,715.75, heretofore paid by the United States to the Delaware Indians, pursuant to the act of Congress of July 13, 1892 (27 Stat., c. 164, page 126), for improvements upon lands sold to the Leavenworth, Pawnee & Western Railway Company?

Second. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $28,954.41, heretofore paid by the United States to individual members of the tribe of Delaware Indians, pursuant to the provisions of the act of Congress of July 13, 1892, for and on account of right of way through allotted lands belonging to members of said tribe, which right of way was secured by the Leavenworth, Pawnee & Western Railroad Company, in accordance with the concluding clause of article 3 of a treaty concluded with the tribe of Delaware Indians on May 30, 1860?

Third. Upon the facts stated in the first and second counts of said petition, were the demurrers thereto properly sustained?

In witness whereof the undersigned judges, holding said United States circuit court of appeals for said eighth circuit, have hereunto set their hands this 17th day of February, A. D. 1896, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said
9 circuit court of appeals, and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

10 UNITED STATES OF AMERICA,
Eighth Circuit, ss:

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of the United States of America, plaintiff in error, vs. The Union Pacific Railway Company, and S. H. Clark, Oliver W. Mink, E. Ellery Anderson, F. R. Coudert, and John W. Doane, as receivers of the Union Pacific Railway Company, defendants in error, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this 17th day of February, A. D. 1896.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed:) Original. U. S. circuit court of appeals, eighth circuit. December term, 1895. No. 652. The United States of America, plain-

tiff in error, vs. Union Pacific Railway Company et al. Certificate of questions to the Supreme Court of the United States. Filed Feb. 17, 1896. John D. Jordan, clerk.

(Indorsement on cover:) Case No. 16197. Term No., 907. The United States, plaintiff in error, vs. The Union Pacific Railway Company et al. U. S. circuit court of appeals, eighth circuit. (Certificate.) Filed February 20th, 1896.